STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
White, P.J., and Sawyer and Saad, J.J.

ROBERT LITTLE and BARBARA LITTLE,

Plaintiffs/Appellants,

Supreme Court Docket No. 121037

STEVEN KIN, ROSALYN KIN, THOMAS TRIVAN, and DARLENE TRIVAN,

Defendants/Appellees

Court of Appeals Docket No. 220894
Trial Court Case No. 98-006136-CZ

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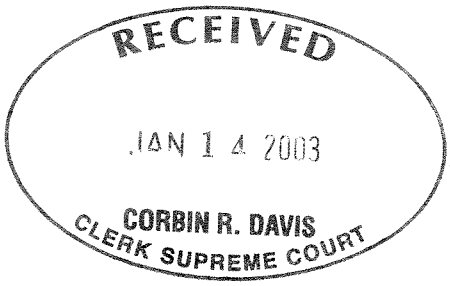
BRIEF ON APPEAL - APPELLANTS



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I. Statement of Judgment or Order Appealed From and Relief Sought

Appellants Robert and Barbara Little appeal from the Court of Appeals decision rendered in this case on February 1, 2002. (See Court of Appeals decision, Appendix at 50a; see also *Little v Kin*, 249 Mich App 502, 644 NW2d 375 (2002)). The Court of Appeals reversed and remanded the trial court's Opinion and Order of February 26, 1999 granting summary disposition to Appellants as a matter of law. (2/26/99 Trial Court Opinion and Order, Appendix 37a; see also 6/14/99 Trial Court Opinion and Order dismissing claims of Defendants, Appendix at 48a.)

Appellants request that this Court reverse the Court of Appeals' decision and reinstate the trial court Orders below.

II. Statement of Basis of Jurisdiction

Defendants/Appellees timely appealed as of right from the trial court's final Opinions and Orders dated February 26, 1999 and June 14, 1999 to the Court of Appeals pursuant to MCR 7.203(A)(1). Plaintiffs/Appellants filed an Application for Leave to Appeal with this court. The Application was granted on November 19, 2002.

III. Statement of Questions Presented for Review

(1) To what extent, if any, riparian or littoral rights may be severed from riparian or littoral land;

(2) To what extent, if any, a riparian or littoral owner may grant an easement to enjoy riparian or littoral rights;

(3) And whether the answers to these questions depend upon:

(a) The type of body of water to which the land abuts, (inland lake, Great Lake, stream, river, etc.),

(b) Whether the original grantor owned the entire body of water and surrounding property, and

(c) Whether the body of water is privately or publicly owned.

(4) Whether the Court of Appeals committed reversible error overruling the trial court's determination as a matter of law that the easement in question did not convey docking rights to Appellees and the trial court's dismissal of Appellees' counter-claim seeking removal of landscaping from the easement area.

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IV. Statement of Facts and Proceedings

A. The Undisputed Facts Underlying the Circuit Court's Order

Appellants and Appellees are neighbors in a development along Pine Lake in West Bloomfield Township. Appellants own the "frontlet" contiguous to and adjoining Pine Lake. (Lot "B" as identified in Survey, Appendix at 13a.) Defendants own "back lot" properties not contiguous to or adjoining Pine Lake. (Lots "D" and "F" on Survey, Appendix at 13a) Appellees' predecessors in interest were granted a 66' easement over Appellants' property to Pine Lake for "access to and use of the riparian rights to Pine Lake". (Easement, Appendix at 16a.) The following facts were undisputed below:

1. Appellants own lakefront property on Pine Lake. As such, Appellants are riparian owners of the property.[1]

2. Defendants are non-riparian "back lot" property owners whose property is near to, however not adjacent to Pine Lake (Survey, Lots D and F, Appendix at 13a.)

3. An easement exists over Plaintiff's lakefront property for the benefit of Defendants, which grants:

> a permanent easement for access to and use of the riparian rights to Pine Lake . . . [Easement, Appendix at 16a.]

B. Background Facts

In or about 1975 or 1976, the C.A. Muer Corporation subdivided property it owned between Pine Lake and the Pine Lake Country Club in West Bloomfield Township into six residential lots, identified as Lots A-F. (Survey, Appendix at 13a.) The residential lots were created through a lot split of an existing platted parcel, and approved by West Bloomfield Township. (May 25, 1976 and June 15, 1976 Minutes of West Bloomfield Township Board, Appendix at 14a and 15a.)

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[1] Appellees conceded below that Appellants are the riparian owners of the property: ". . . Plaintiffs [Appellants] continue to own all riparian rights along their 100 foot section of beach." Defendants' Brief in Support of Motion for Summary Disposition at p. 10, 12/09/98.

Appellants, Robert and Barbara Little, purchased lot B in 1977. (Affidavit of Robert Little, ¶2, Appendix at 30a.) This purchase was subject to the easement now in dispute. Richard McManus, C.A. Muer's broker, informed the Littles that purchasers of the back lots behind the Little property would not have boat-docking privileges on Pine Lake. Instead, the back lot owners could only obtain boat-docking rights through a gentlemen's agreement with Mr. Little. (Little Affidavit, ¶5, Appendix at 30a.)

Mr. Little testified that, for 11 years, he and his neighbors understood that only he had boat docking rights under the easement, and that the other back lot owners never attempted to build their own dock. (Little Affidavit ¶¶2,7, Appendix at 30a-31a.) Joseph Ziomek purchased the other front lot on Pine Lake, Lot A. (Affidavit of Joseph Ziomek, Appendix at 27a.) The back lot owners behind Mr. Ziomek have never had their own dock on Pine Lake. Rather, Mr. Ziomek testified that he built one dock on his lake frontage and shared it with his two back lot neighbors who owned lots C and E. (Ziomek Affidavit, ¶4, Appendix at 28a.)

In 1988, Jack Findlay, then owner of back lot D, requested permission from Mr. Little to build a structure on Mr. Little's lakefront property. (Little Affidavit, ¶8, Appendix at 31a; Ziomek Affidavit, ¶3, Appendix at 27a-28a.) Mr. Little testified that Mr. Findley mislead him into believing it would be a small dock to accommodate sunbathing for his daughter, not a boat dock. (Little Affidavit, ¶8, Appendix at 31a; see also 1988 correspondence between Little and Findlay regarding the dispute, Appendix at 18a, 21a, and 22a.)

Defendants obtained the testimony of Leo Beil in 1998 and 1999, an officer with C.A. Muer Corporation. (Affidavit of Leo Beil, Appendix at 23a; deposition transcript of Leo Beil dated May 11, 1999, Appendix at 39a.) Mr. Beil acknowledged his belief that the easement in dispute granted various lake rights to the back lot owners. Mr. Beil did not specify that boat-docking privileges were among those rights. (See Beil Affidavit, ¶10, Appendix at 25a.) In

addition, Mr. Beil testified that C.A. Muer did not intend to convey rights inconsistent with Michigan law or the West Bloomfield Township Ordinance:

> Q. Was it the corporation's intent to convey any rights that may have been contrary to Michigan law?
>
> A. Contrary to Michigan law? Never.
>
> Q. Was it the corporation's intent to convey any rights that may have been contrary to West Bloomfield Township ordinance?
>
> A. No. I think I stated earlier it had to be within the framework of the law.
>
> ***
>
> Q. If, pursuant to Township ordinance, the back lot owners were prohibited from erecting the own docks, it wasn't your intent to allow them to do that: correct?
>
> A. I think I stated earlier that it had to be within the confines of the law.

(Beil dep. at 23,28, Appendix at 44a-45a.) It was undisputed that West Bloomfield Township's Ordinance governing lakefront uses does not allow back lot owners to erect docks on Pine Lake. (See Appendix at 17a, 19a, 20a and 58a; 1988 correspondence, documents and ordinance regarding boat docking rights in West Bloomfield.) ("The Township only recognizes docks, boat docking and waterfront use by those owners of land with lake frontage." 7/7/88 correspondence of Thomas K. Bird, West Bloomfield Township Planning Director, Appendix at 20a.)

C. Proceedings Below

Appellants filed this declaratory action requesting that the court determine the parties' rights under the easement.[2] Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Appellants filed a cross-motion for summary disposition under MCR 2.116(I)(2), seeking relief as a matter of law pursuant to MCR 2.116(C)(8), or alternatively under MCR 2.116(C)(10).

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[2] A suit was originally filed by Defendant Trivans only, against the Littles, Oakland County Circuit case no. 96-522375-CZ, but it was agreed that a new action should be brought involving all interested parties.

Importantly, both parties conceded at argument that the easement was unambiguous and that the trial court could resolve the case as a matter of law. (Trial court hearing transcript at 6, lines 19-27 and at 20, lines 16-23 [Appellees' counsel], and at 9, lines 26-28 [Appellants' counsel], Appendix at 34a, 36a and 35a.)

The trial court resolved the case "as a matter of law." (2/26/99 Op/Order at 1, Appendix at 37a.) The trial court held that Defendants could not claim riparian rights, such as the right to build a dock, as a matter of law, "since their properties do not abut the shoreline." Id at 2. The trial court ruled that:

> The Easement granted to the Defendants give no title to the land on which it is imposed and is not an estate in the land. As a result, the use of the Easement must be strictly confined to the purpose for which it was granted.
>
> The extent of the language provided in the Easement is limited by specific words – the right for access to and use of Pine Lake. The words "riparian rights" as provided in the Easement must be construed to mean nothing more that an easement appurtenant to such right. However, such right should not be construed to include purposes other than those related to the access to and use of the Lake itself. Consequently, the Defendants have the unrestricted right of access to use Pine Lake for purposes of swimming, fishing, bathing, wading and boating. It does not include the right to construct fixtures, including, but not necessarily limited to, docks, and/or boat hoists. The latter rights are limited to the exclusive rights of riparian owners. *Hess v West Bloomfield*, 439 Mich 550 (1992). *See also, Thies v Howland*, 424 Mich 282 (1985).

(Appendix at 38a.)

Defendants' Counter-Complaint was not specifically addressed in the motion which led to the February 26 Opinion and Order. The essence of the Counter-Complaint is summed up in paragraph 5:

> Counter-Defendants' [Appellants], however, have intentionally placed, installed or constructed improvements upon the beach so as to interfere and obstruct Counter-Plaintiffs' full use and enjoyment of their easement rights. For example, Counter-Defendants planted thorn-bearing bushes and installed landscape timbers on Counter-Plaintiffs' easement, thus

making it impossible for Counter-Plaintiffs to use the beach for picnicking, sunbathing or lounging.

(12/09/98 Counter-Complaint, ¶ 5.) Appellees sought removal of the landscaping and other improvements.

Appellants brought a subsequent motion to dismiss the counter-complaint, arguing that the trial court's Opinion and Order also resolved this issue. The trial court agreed, and issued an Opinion and Order dated June 14, 1999, granting Appellants' motion. (Appendix at 48a.) Defendants appealed the trial court's Orders. In a decision from which Appellants now appeal, the Court of Appeals reversed the trial court's Opinion and Order of February 26, 1999 and remanded this case for trial on the scope of the easement. (Court of Appeals decision, Appendix 50a; see also *Little v Kin*, 249 Mich App 502, 644 NW2d 375 (2002)).

V. Argument

A. Riparian or Littoral Rights May Not Be Severed From Riparian or Littoral Land.

Standard of Review

The questions involved in this appeal arise from the grant of summary disposition and the determination of legal issues and are governed by a de novo standard of review. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

1. Michigan Law Clearly States That Riparian/Littoral Rights May Not Be Severed From Riparian/Littoral Land.

Michigan law has traditionally recognized that riparian right and littoral rights, terms that mean slightly different things but have been used interchangeably by the courts, may not be severed from riparian or littoral land. This court made this clear in the plurality decision in *Thompson v Enz*, 379 Mich. 667; 154 NW2d 473 (1967)(Kavanaugh J). Land which includes or is bounded by natural watercourse is defined as riparian. A riparian proprietor is an owner of

land bounded by a watercourse or lake or through which a stream flows. *Id* at 677-78 (citations omitted).

This court in *Thompson* cited to several prior decisions to further support this proposition:

> 'Riparian rights,' accorded lot owners separated from the beach by intervening lots, can be given no greater meaning than right of access to the beach and enjoyment thereof for the purposes of recreation. [*Schofield v Dingman*, 261 Mich 611, 613; 247 NW 67 (1933)]
>
> * * *
>
> It is settled law both in this State and elsewhere, so settled that no contrary authority has been cited, that the interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner. *The basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water.* [*Hilt v Weber*, 252 Mich 198, 218; 226 NW 159 (1930) (emphasis supplied by court).]
>
> * * *
>
> Under the conveyance to complainant of lot 5, she acquired no riparian rights whatever. This lot was conveyed according to a plat which reserved a strip of land between the lot and the waters of the bay, *and a strip 2 rods wide would as effectively cut off from lot 5 all riparian rights as would a much wider strip.* [*Richardson v Prentiss*, 48 Mich 88, 89, 11 NW 819 (1882)(emphasis supplied by court).]

Thompson, 379 Mich at 668-79. The *Thompson* court also rejected the defendants attempt to find support in the decision of *Bauman v Barendregt*, 251 Mich 67; 231 NW 70 (1930), wherein Judge Fead stated: "It is a settled rule in this State that, *where there is no reservation of them*, riparian rights attach to lots bounded by natural water courses." *Id* at 69 (emphasis supplied by court):

> We hold that what is meant by this "reservation" of riparian rights is merely the reservation of a right-of-way for access to the watercourse. In *Richardson v Prentiss*, 48 Mich 88, upon which Judge Fead relied in making this statement concerning reservation of rights, it is clear that the Court while speaking of the reservation meant a reservation not of riparian rights, but rather of a right-of-way (p91). This, however, cannot and does not give rise to riparian rights. *Schofield v Dingman*, 261 Mich 611.

Thompson, 376 Mich at 685. The *Thompson* court then stated:

> **We hold that riparian rights are not alienable, severable, divisible, or assignable apart from the land which includes therein, or is bounded, by a natural water course.**

Id at 686 (emphasis added).

This court re-emphasized the principle of no severance of riparian rights in *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985):

> Land which includes or is bounded by natural watercourse is defined as riparian. Persons who own an estate or have a possessory interest in riparian land enjoy certain exclusive rights. *Thompson v Enz*, 379 Mich 667, 677-679; 154 NW2d 473 (1967) (opinion of Kavanagh, J.). These include the right to erect and maintain docks along the owner's shore, *Hilt v Weber*, 252 Mich 198, 226; 233 NW 159 (1930); Thompson, Real Property (1980) Replacement), Secs. 274,280, pp 453-454, 506-507; 3 American Law of Property, Sec. 15.35, pp 874-875, and the right to anchor boats permanently off the owner's shore. *Hall v Wantz*, 336 Mich 112, 117; 57 NW2d 462 (1953). Nonriparian owners and members of the public who gain access to navigable waterbody have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. *Delaney v Pond*, 350 Mich 685, 688; 86 NW2d 816 (1957) Hall, 336 Mich 116-117.

Based on its extensive prior precedent, this court in *Thompson* and *Thies* unequivocally reaffirmed the principle that riparian rights may not be severed from riparian land.

2. Whether the Answers to the Above Question Depends Upon (a) The Type of Body of Water to Which the Land Abuts, (b) Whether the Original Grantor Owned the Entire Body of Water and Surrounding Property, and (c) Whether the Body of Water is Privately or Publicly Owned.

The Michigan cases giving rise to the principle of non-severance of riparian rights from riparian land do not appear to distinguish their decisions upon the type of body of water the land abuts, whether the original grantor owned the entire body of water and surrounding property, or whether the water is private or public.

B. A Riparian or Littoral Owner May Not Grant an Easement to Enjoy Riparian or Littoral Rights.

Standard of Review

This issue is also governed by a de novo standard of review.

1. Michigan Law Clearly States that Riparian/Littoral Rights are "Exclusive" to Riparian/Littoral Landowners.

As a matter of logic, one would think the answer to question A above resolves question B. If riparian rights cannot be severed, alienated, divided or assigned, it reasons that they may not be severed, alienated, divided or assigned by easement conveyance.

More importantly, this Court has enunciated a doctrine of exclusive rights for riparian owners, including docking rights.

> Land which includes or is bounded by a natural water course is defined as riparian. Persons who own an estate or have a possessory interest in riparian land enjoy certain **exclusive rights. These include the right to erect and maintain docks** along the owner's shore, and the right to anchor boats permanently off the owner's shore.

Hess v West Bloomfield, 439 Mich 550, 561-62 (1992) (emphasis added);[3] See also *Thies v Howland*, 424 Mich 282, 287-88 (1985):

> Land which includes or is bounded by a natural watercourse is defined as riparian. Persons who own an estate or have a possessory interest in riparian land enjoy certain exclusive rights. *Thompson v Enz*, 379 Mich 667, 677-679, 154 NW2dd 473 (1967)(opinion of Kavanagh, J.) These include the right to erect and maintain docks along the owner's shore, *Hilt v Weber*, 252 Mich 198, 226 NW 159 (1930); Thompson, Real Property (1980 Replacement), §§ 274, 280, pp. 453-454, 506-507; 2 American Law of Property, §15.35, pp. 874-875, and the right to anchor boats permanently off the owner's shore. *Hall v Wantz*, 336 Mich 112, 117, 57 NW2d 462 (1953).

(footnotes omitted)

The doctrine of exclusive rights for riparian property owners dates at least to 1930, according to *Thies*. This Court must have meant what it said when it used the term "exclusive" in

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[3] The Court of Appeals' decision does not mention *Hess*, even though the trial court applied the decision below.

these decisions. Respectfully, the Court of Appeals nullifies this doctrine of exclusive rights through its decision in this case.

To be sure, the cases involving easements and riparian rights appear to contain inconsistencies. The Court of Appeals identifies cases where both this Court and the Court of Appeals implied non-lakefront owners may maintain a dock. All but one of these cases, however, involved the interpretation of plat dedications where back lot owners had common ownership over property abutting the waterfront. For example, where a public dedication in a plat is involved, the riparian property owner may not "prevent Appellants from erecting a dock or permanently anchoring their boats if these activities are within the scope of the plat's dedication." *Thies*, 424 Mich at 289 (citing *McCardel v Smolen*, 404 Mich 89 (1978)(streets and alleys abutting waterfront were shown on the plat as "dedicated to the use of the public". *Id.* at 93)).

This court in *Thies* also reviewed the trial court and court of appeals decisions ruling that the easement granted by consent judgment in that case did not convey the right to build a dock. Without question, it is difficult to reconcile a broad reading of this portion of the decision with the principles of non-severance of riparian rights and exclusivity of riparian rights. As such, this portion of the court's decision in *Thies* should be carefully applied as to not negate the principles of non-severance and exclusivity. The trial court, court of appeals, and supreme court in *Thies* all concluded that the easement terms did not expressly convey docking rights. Specifically, this court ruled: "Defendants' use of plaintiffs' land is defined by the terms of the easement agreement and must be confined to the purposes for which the easement was created." 424 Mich at 296-97. Likewise, the easement in this case does not expressly convey docking rights. The purported conveyance or reservation of "riparian rights" in the easement can mean nothing more than a right-of-way access. *Thompson, Schofield, Richardson, supra.*

Further, the court of appeals substantively misinterpreted with respect to the easement holders right to use the water. The court cited *Thies* in stating: "nonriparian lot owners who hold an easement for lake access have the limited 'right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming.'" (Appendix at 53a.) However in *Thies*, the easement only granted access. The easement did not grant the right to use the surface of the lake. The right to use the surface of the water is derived from the public, navigable nature of that lake:

> Nonriparian owners and members of the public who gain access to a **navigable waterbody** have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. Delaney v Pond, 350 Mich 685, 688, 86 NW2d 816 (1957); Hall, 336 Mich 116-117, 57 NW2d 462.

424 Mich 287-88 (emphasis added). Pine Lake is not a public, navigable body of water. As a non-navigable private lake, the public has no right to use the waters, without the permission or license of a riparian owner. Public rights in navigable and non-navigable waters are discussed in much more detail below. However, it is important to note that the court of appeals respectfully failed to identify this important distinction in the *Thies* decision.

The court of appeals likewise miscited *Thompson*. The court stated that "the *Thompson* Court specifically recognized that a riparian owner may grant non-riparian owners the right to access *and enjoy* a lake by easement or license. Id. at 686." (Appendix at 53a-54a; emphasis added). However, the actual holding from this court in *Thompson* reads as follows:

> While riparian rights may not be conveyed or reserved—nor do they exist by virtue of being bounded by an artificial watercourse—easements, licenses and the like **for a right-of-way for access** to a watercourse do exist and ofttimes are granted to non-riparian owners.
>
> We will, therefore, treat the proposal here as though easements for **rights-of-way for access** are given to the back lot purchasers.

379 Mich at 686 (emphasis added.) This court in *Thompson* never held that an easement could grant the right *to enjoy* a lake or other body of water. Applied to the present case, the easement grants Defendants only a right-of-way for access.

The facts in *Dobie v Morrison*, 227 Mich App 536; 575 NW2d 817 (1998), also cited by the court of appeals below, involved a **public dedication** contained in a plat. Specifically, the plattor had dedicated land for a park to "the use of the owners of lots in this plat which have no lake frontage." 227 Mich App at 537. Accordingly, even though the subdivision property owners in *Dobie* did not have riparian rights in the park, they could still erect a dock if it was within the scope of the public dedication, and did not unreasonably interfere with the exercise of plaintiff's riparian rights. 227 Mich App at 541. But see *Cabal v Kent County Road Commission*, 72 Mich App 532; 250 NW2d 121 (1976)(granting docking rights under easement, not plat dedication).[4]

The Court of Appeals makes only one reference to the doctrine of exclusive rights, but never explains how "exclusive" does not really mean "exclusive". By holding that non-riparian owners can attain the right to build a dock by easement, the court effectively overruled the doctrine of exclusive rights and allows for the severance of a right deemed exclusively riparian.

Importantly, this court never reached the issue of whether riparian rights could be conveyed by easement in *Thies*. Rather, this court found that the trial court and appellate court decisions based on the express terms of the easement was appropriate. The principles of non-severance and exclusivity of riparian rights in the riparian landowner enunciated by this court are

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[4] *Cabal* was decided before *Hess* and *Thies* and fails to cite *Thompson*. The holding in *Cabal* simply cannot be reconciled with the doctrine of exclusive rights for riparian owners enunciated by this Court. Further, the court in *Cabal* held that the right to a dock was appurtenant to the right to enjoy boating. 72 Mich App at 536. Yet, this Court has ruled that the right of access to water includes the right to boating, as well as fishing and swimming. *Thies*, 424 Mich at 288. Under the logic of *Cabal*, then, **all** access easements would allow docks, as appurtenant to the right of boating implied in the access easement.

undermined by allowing the riparian right of boat docking to be conveyed by easement. Further, the easement at issue here does not expressly convey docking rights.

2. Whether the Answers to the Above Question Depends Upon (a) the Type of Body of Water to which The Land Abuts, (b) Whether the Original Grantor Owned the Entire Body of Water and Surrounding Property, and (c) Whether the Body of Water is Privately or Publicly Owned.

Whether or not the enjoyment of riparian rights may be conveyed by easement does not appear to turn whether the original grantor owned the entire body of water and surrounding property. However, there does appear to be a distinction in Michigan law on the use and enjoyment of water premised upon on the type of body of water the land abuts and whether the water is private or public.

Michigan law identifies navigable waters as public waters and non-navigable waters as private waters. Navigable/public waters are burden by the public right of navigation. Non-navigable/private waters are not burden by this navigational servitude, but are exclusively controlled by the riparian owners.

This Court in *Lorman v Benson*, 8 Mich 18 (1860) retained title to the bottomland of the Great Lakes in trust for the benefit of the public. Since the beds of the Great Lakes are held in trust for the public, without question the public may use the Great Lakes for navigation. This Court in *Lorman* also transferred title of the submerged soil of inland navigable waters to riparian owners burden by the public right of navigation.

Collins v Gerhardt, 237 Mich 38, 43; 211 NW 115 (1926) states the navigability in fact test (strictly navigable), in which waters navigable in fact by large vessels engaged in commerce are navigable in law. *Moore v Sanborne*, 2 Mich 519 (1853) expands navigability (qualified navigable) to include inland waterways capable of floating logs or timber.

This Court in *Bott v The Commission of Natural Resources*, 415 Mich 45, 60; 327 NW2d 838 (1982) extended the public-trust concept to strictly and qualified navigable waters:

> The established law of this state is that the title of a riparian or littoral owner includes the bed to the thread or midpoint of the water, subject to servitude for commercial navigation of ships and logs and where the waters are so navigable, for fishing. *Lorman v Benson*, 8 Mich 18 (1860); *Moore v. Sanborne*, 2 Mich 519 (1853); *Collins v Gerhardt*, 237 Mich 38 (1926); *Attorney General v Taggart*, 306 Mich 432 (1943).

This court in *Bott* recognized that certain bodies of water were non-navigable/private waters, and therefore not subject to the publics right of navigation. *Id* at 71 ("The public-trust doctrine applies only to navigable waters and not to all waters of the state. The public trust does not attach to lakes unconnected to other waterways or to lakes with only one inlet or outlet held in *Winans* not to be navigable.") In *Winans v Willetts*, 197 Mich 512; 163 NW 993 (1917), this court held that the littoral owner of all the land surrounding a small inland dead- end lake has the sole right to use it. This court also held in *Giddings v Rogalewski*, 192 Mich. 319; 158 NW 951 (1916), that a lake entirely surrounded by private property was not navigable.[5]

According to the rule of *Giddings* and *Winans*, Pine Lake is not navigable. Pine Lake is entirely surrounded by private property. Pine Lake is not connected to other waterways or lakes, has no inlet or outlet, and therefore cannot be part of an aquatic highway. See also *Pigorsh v. Fahner*, 386 Mich 508; 194 NW2d 343 (1972); *Putnam v Kinney*, 248 Mich 410; 227 NW 741 (1929).

In *Winans*, this court determined Winans Lake to be private. Winans Lake is about 100 acres in size and completely surrounded by a public highway. A member of the public could simply step off the highway and enter the lake. The lake had an outlet connecting eventually with Lake Erie. This Court held at p. 518:

> It is plain, however, that the lake is not a public, navigable body of water, and is a privately owned pond. They [the public] can no more enter without permission the portions of the premises covered by water than they can

[5] The Michigan Attorney General has opined that a private inland lake becomes public when the State becomes a riparian owner of land on the lake. OAG , 1959-60 No 2553, p 152 (August 5, 1959).

> invade the uplands of the riparian owners. *Giddings v Rogalewski*, 192 Mich 319.

In *Putnam*, a single individual owned all of the land surrounding Conover Lake. Conover Lake is about 112 acres with no inlet or outlet. A public highway runs along a portion of the lake. The landowner put up a fence to prevent members of the public from entering the lake from the highway. The fence was destroyed and the landowners brought suit to enjoin further trespasses:

> If Conover Lake is a public navigable lake, the public has a right to navigate it and fish in its waters. [Citations omitted.] The true test of navigability is whether the waters under consideration are capable of being used by the public as thoroughfares or highways for purposes of commerce, trade, and travel by the usual and ordinary modes of navigation. *Giddings v Rogalewski*, 192 Mich 319.

Putman, 248 Mich at 413-414.

In *Pleasant Lake Hills Corp. v Eppinger*, 235 Mich 174; 209 NW 152 (1926) this Court found that if a body of water is non-navigable, then members of the public may not use the water, even though they have lawful access. In *Burt v Munger*, 314 Mich 659, 662-63; 23 NW2d 117 (1946), this Court upheld the trial court's ruling that: "where there are several riparian proprietors of an inland lake, that all such proprietors and their lessees may use the surface of the whole lake for boating, fishing, and fowling purposes, if access is gained to the lake from their own or leased land; and that no one riparian proprietor can exclude another riparian proprietor from the exercise of these rights; and that neither can one riparian proprietor exclude the lessees of another riparian proprietor from the exercise of the rights."

In the instant case, Pine Lake is private/non-navigable lake, with no navigable inlet or outlet, entirely owned by private riparian proprietors, and therefore not subject to the public's right of navigation. The only persons permitted to use and enjoy the surface of Pine Lake are the riparian owners and their invitees, lessees and licensees.

The controlling cases relied on by the court of appeals all dealt with public waters, and the court overlooked the importance of the distinction between public and private waters. The court of appeals is wrong in presuming that a right-of-way access to Pine Lake, a private lake, also conveys rights to enjoy the water similar to those rights the public enjoys in navigable, public lakes.

C. The Court of Appeals Erred in Reversing the Two Trial Court Rulings

Standard of Review

Summary disposition on the scope of the easement was granted in favor of Appellees as a matter of law pursuant to MCR 2.116(C)(8). Accordingly, the standard of review is de novo.

A motion for summary disposition under 2.116(C)(8), contending that a pleading fails to state a claim upon which relief can be granted, generally challenges the legal sufficiency of the pleadings alone. However, in an action based on a contract, the court may examine the contractual documents in connection with the motion. *Second Benton Harbor v St Paul Title*, 126 Mich App 580, 585; 337 NW2d 585 (1983). In *Second Benton Harbor*, the trial court dismissed plaintiff's claim for failure to state a claim upon which relief can be granted after interpreting the contract attached to the pleadings. In this case, the controlling contract, the easement, is similarly attached to the Complaint.

1. The Court of Appeals' Decision Conflicts With This Court's Decision in *Schofield v Dingman*.

In *Schofield v Dingman*, 261 Mich 611 (1933), this Court addressed a fact scenario similar to the one present here. See also *Turner Prop Owners v Schneider*, 4 Mich App 388; 144 NW2d 848 (1966)(involving the same underlying facts). This court held in *Schofield* that the use of the term "riparian rights" in a conveyance only gave back lot owners the right of access to and use of the beach and lake, and no more. The court of appeals parenthetically references the *Schofield* holding without substantive analysis.

In *Schofield*, Thomas Turner subdivided property along Lake Michigan. Some lots were sold along the bluff that overlooked the beach. The remaining properties were "back lots" that did not abut the bluff.[6] Turner apparently retained ownership in the beach land itself, but, in order to induce purchases, represented that "riparian rights" went along with all of the lots, and also incorporated these riparian rights in some of the documents of conveyance. 261 Mich at 611-12.

The trial court decision, which was upheld by the Michigan Supreme Court, distinguished between the back lot and front lot (bluff) classes of ownership. First, as to the back lot owners:

> "Riparian rights" accorded lot owners separated from the beach by intervening lots can be given no greater meaning than right of access to the beach and enjoyment thereof for the purposes of recreation. This decree granted, and was what Mr. Turner clearly intended by the misnomer "riparian rights".

261 Mich at 613. Thus, the term riparian rights with respect to the back lot owners was interpreted only to provide them an easement for access to the beach and enjoyment thereof for the purposes of recreation.

The court, however, upheld greater rights for the property owners whose lots went up to the edge of the bluff overlooking the beach:

> The owners of lots abutting the edge of the bluff were accorded some additional rights by the decree, short, however, of title to land not conveyed to them. Other deeds were of specific quantifies of land ending at the bluff, and the term 'riparian rights' in such conveyances of land, short of reaching the meander line, must be held to have vested only a permanent easement, suitable of enjoyment of direct access to the lake and use of methods and means adapted to such end.

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[6] The conveyance to property owners owning to the bluff extended "to the bank of Lake Michigan" and with "riparian rights". See *Schneider*, 4 Mich App at 390. At times of high water, the water actually washed all the way up to the foot of the bluff. But most of the time, there was a sand beach between the bluff and the water. *Schofield,* 261 Mich at 612.

61 Mich at 613. For these property owners who abutted the bluff, the circuit court's decree did grant the right "to make every other use therefore lawfully incident and belonging to an owner of property having 'riparian rights' . . " *Id.*

In short, the rights acquired by the back lot owner's were much more restricted than those acquired by the owners that abutted the bluff, directly overlooking the beach and water. The decision in *Schneider* by the Court of Appeals reiterates the holding of *Schofield.* 4 Mich App at 390-91.

The courts in *Schofield* and *Schneider* treated the property owners whose land abutted the bluff and "extended to the back of Lake Michigan" as riparian owners with respect to their rights. However, the back lot owners were not accorded the same rights. Instead, they were limited to an easement for access and use of the beach and lake only. The 1977 easement in this case, drafted 44 years after the *Schofield* decision purported to convey riparian rights to the lake to back lot owners. Like the back lot owners in *Schofield*, the use of the "misnomer" term of riparian rights in the easement should be limited to access only.

This court in *Thompson* relied on and restated the *Schofield* holding. This court likewise stated that a "reservation" of riparian rights only conveyed a right-of-way for access in distinguishing the decision of *Bauman v Barendregt*, 251 Mich 67:

> We hold that what is meant by this "reservation" of riparian rights is merely the reservation of a right-of-way for access to the water course. In *Richardson v Prentiss*, 48 Mich 88, upon which Judge Fead [in *Bauman*] relied in making this statement concerning reservation of rights, it is clear that the Court while speaking of the reservation meant a reservation not of riparian rights, but rather of a right-of-way (p91). This, however, cannot and does not give rise to riparian rights. *Schofield v Dingman*, 261 Mich 611.

Thompson, 376 Mich at 685.

The fact scenario in this case is stronger than that in *Schofield*, since the Littles own to the shoreline of Pine Lake. As in the *Schofield* decision, the use of the term "riparian rights" in

the easement at issue is a "misnomer" and simply conveys a right of access only. 61 Mich at 613. Respectfully, the court of appeals' decision in this case effectively overrules *Schofield*, is inconsistent with *Thompson*, and thus should be reversed.

2. The Court of Appeals' Decision Mistakes the Facts

In addition to relying on law contrary to that of Michigan, the Court of Appeals also wrongly assumes that Appellees paid "significant premiums for their lots", in part based on the subject easement. (Court of Appeals decision at 7, Appendix at 56a.) Appellees did not present any evidence of what their successors paid for their lots. The Littles paid $40.000 for the front lot, while back lot D sold for $30,000 and back lot F sold for $35,000 (it abuts the Pine Lake Country Club golf course). Instead, Appellees cited the Little **lot** purchase price and compared it to Appellees **house** purchase prices years later, an "apples and oranges" approach. The houses are near Pine Lake, lot F abuts the Pine Lake Country Club, and both lots are in an exclusive area of West Bloomfield Township. It is a stretch to say that, from the purchase price alone, it is evident a premium was paid, absent comparable sales data. To the contrary, the Littles paid a 25% premium over lot D and a 12.5% premium over lot F for the front lot with riparian rights. Yet, this unsupported presumption by the court appears to be important to its reasoning.

Further, the Court of Appeals does not cite the deposition testimony of the grantor's representative, Leo Biel. Mr. Biel's affidavit does not mention dock rights, and he acknowledged that there was no intention to grant any rights to the back lot owners that were inconsistent with Michigan law or local Township regulations. (Beil dep. at 23,28, Appendix at 44a-45a.) There is no dispute in this case that West Bloomfield Township Ordinance only allows lakefront, riparian owners the right to have a dock. (See Appendix at 17a, 19a, 20a and 58a; 1988 correspondence, documents and ordinance regarding boat docking rights in West Bloomfield.) ("The Township only recognizes docks, boat docking and waterfront use by those owners of land

with lake frontage." 7/7/88 correspondence of Thomas K. Bird, West Bloomfield Township Planning Director, Appendix at 20a.)

Although the trial court did not reach these facts, just as she did not reach the facts of lot or home values, the court of appeals appears to wrongly assume that the grantor meant to expressly provide dock rights to the back lot owners, notwithstanding Michigan and local law.

3. The Trial Court Properly Dismissed the Counter-Complaint.

There was never a dispute in this case that Appellees had adequate access to the lake, and that Appellants' landscaping in no way interfered in their ability to traverse the land subject to the easement for use and access of the lake. Indeed, the landscaping has existed for years, and is common all along the shoreline due the steepness and shallowness of the land bordering the lake. This issue is not about interference with Appellees' access to the lake, but rather Appellees' attempt to turn the easement into something that it, by its express words, plainly is not: an easement for unfettered use of the **land**. Appellees argued that they had the right to use the entire 66-foot easement area itself as they wished, and thus argued for removal of the landscaping.

Appellees' position is inconsistent with Michigan law. See *Delaney v Pond*, 350 Mich 685 (1957). Michigan law holds that the rights of easement holders are defined by the easement agreement. *Thies v Howland*, 424 Mich App 282, 297 (1985). The trial court correctly ruled that the easement was limited to access and use of the lake only:

> The extent of the language provided in the Easement is limited by specific words - the right for access to and use of Pine Lake. The words "riparian rights" as provided in the Easement must be construed to mean nothing more than an easement appurtenant to such right. However, such right should not be construed to include purposes other than those related to the access to and use of the Lake itself. Consequently, the Appellants have the unrestricted right of access to use Pine Lake for purposes of swimming, fishing, bathing, wading and boating.

(2/26/99 Opinion and Order at 2, Appendix at 38a; see also Appendix at 48a.) Importantly, the subject easement does not extend to Appellees' rights to "use the beach for picnicking, sun bathing or lounging." Such uses do not come with the scope of "access to and use of" Pine Lake. These uses sought by Appellees relate to use of the land, not the lake; rights to use of land, other than for access, were not conveyed in the easement.

In *Delaney v Pond*, 350 Mich 685 (1957), the Michigan Supreme Court addressed an easement dispute involving very similar facts to this case. In *Delaney*, the plaintiffs had an easement over defendant's property for access to a river and lake. The lower court ruled that plaintiffs did not have the right to use of the land, other than for access to the water:

> In the present case, the extent of the easement is limited by specific words to the right of access to Clinton River and Loon Lake. . . . Such right, however, to enjoy the use of the adjacent waters cannot logically be construed as a right to use of the lands of the Appellants for purposes other than those related to the use of the water itself.
>
> It would seem to follow logically therefore, that the Appellees do have an unrestricted right of access to the use of the waters of Clinton River and Loon Lake for the purpose of swimming, fishing, bathing, wading and boating. It does not follow that the Plaintiffs have the right to sun bathe on the Defendants' property, for it cannot be said that sun bathing is a use of the adjacent waters, nor can it be said that permanent mooring a boat is included in the right to fish and boat.

350 Mich at 687-88. This court agreed:

> The rights granted to Plaintiffs to make use of the water granted to Plaintiffs no rights to the bordering land beyond that necessary to permit enjoyment of the water rights.

350 Mich at 687. Accordingly, the Supreme Court upheld the lower court's denial of plaintiff's request for sun bathing and permanent boat mooring rights on the property.

Also important, the Appellants have the right to use all of the land they own in fee so long as that use is not inconsistent with the specific rights granted in the easement. *Grinnell Brothers v Brown*, 205 Mich 134 (1919). In *Grinnell*, the Michigan Supreme Court held that the

fee owner of land has the right to construct improvements on land burdened by an easement. The Michigan Supreme Court quoted other legal authority for the following propositions:

> It is elementary that an easement once granted is an estate which cannot be abridged or taken away, either by the grantor or his subsequent grantees. On the other hand, the grantor of the easement of a right of way may use the way in any manner he sees fit, provided he does not unreasonable interfere with the grantee's reasonable use in passing to and fro.
>
> * * *
>
> The owner of land over which there is a passage-way may lawfully cover such passage-way with a building, provided he leaves a space of sufficient width and height and with sufficient light to allow of its convenient use for the purpose for which it was created.
>
> * * *
>
> It is a general rule that a grant of an easement of a right of way does not, by implication, include the right to have the way kept open to the sky for light and air, and that the grant is not interfered with by building over the way, provided there is no interference with the reasonable use of the easement as a passage-way.

205 Mich at 138-39 (emphasis added; citations omitted).

The *Grinnell* court found that the proposed improvement did not appear to interfere with in any way with "any vehicle or loads plaintiff may desire to transport over the way." 205 Mich at 141. See also, *Kirby v Meyering Land Co*, 260 Mich 156 (1932)(approving the construction of clubhouse by fee owners on easement where improvement does not prevent passage to the lake).

Appellees have both a stairway access and open land access to Pine Lake in order to exercise the rights granted to them under the subject easement. Under Michigan law, they do not have the right to exercise control over the land bordering the lake, or to remove landscaping that has been place for years without incident until this lawsuit.

VI. Conclusion and Relief Requested

When the easement at issue here was created in 1976, all the relevant parties understood that only the front lot owners would have a dock. The fact that no one, other than the front lot owners, even attempted to build a dock for 11 years demonstrates this. The fact that Mr. Findlay, back lot D's prior owner, sought Mr. Little's permission (albeit under false pretenses) for the structure to be built further demonstrates it. More importantly, however, as a matter of Township Ordinance and Michigan case law, it was clear that the back lot owners only obtained the right to access and use of lake, nothing more.

Under the Court of Appeals' reasoning, any waterfront owner may now sell easements to their back lot neighbors for docks, expanding the number of docks and boat usage on the water. West Bloomfield Township's Planning Director in his 1987 memorandum regarding docking rights in the Township expressed this concern:

> **The effect of allowing this division would be the selling of private easements to non-lakefront property owners in order to reduce taxes with the result of lake use overcrowding.**

(Township Planner Bird Memorandum, ¶3, Appendix at 17a, emphasis added.) Moreover, by nullifying the non-severance and exclusive right doctrines for riparian owners, holders of ingress/egress only easements are now free to dust off their easement documents and litigate whether they should be allowed a dock, even though the easement does not specifically provide for a dock.

The doctrine of exclusive rights for riparian owners, including the right to a dock, has been long held in this state's jurisprudence. The doctrine advances the protection of water resources within the State. This important legal principle should not be overruled by implication by the Court of Appeals.

For the foregoing reasons, Appellees request that this Court reverse the Court of Appeals and affirm the trial court.

Respectfully submitted,

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Dated: January 13, 2003

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT LITTLE and
BARBARA LITTLE,

Plaintiffs/Appellants,

STEVEN KIN, ROSALYN KIN,
THOMAS TRIVAN, and DARLENE
TRIVAN,

Defendants/Appellees

Docket No. 121037
Court of Appeals Docket 220894

Lower Court Case No. 98-006136-CZ

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PROOF OF SERVICE

Kathleen A. Parks states that on the 14th day of January, 2003 she did forward a copy of Plaintiffs/Appellants' Brief on Appeal and Proof of Service by first class mail to:

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I declare that the statements above are true to the best of my information, knowledge and belief. MCR 2.114(A)(2)(b).

Kathleen A. Parks